Supreme Court, U.S.
FILED
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No.

In the
Supreme Court of the United States

OCTOBER TERM, 1996

ANDREW MARTIN KRANYIK,
Petitioner,

v.

CITY OF WEST MELBOURNE, BRAIN LOCK,
and PAOLO DONISI,

Respondents.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR WRIT OF CERTIORARI

ANDREW KRANYIK
pro se
7640 Coral Drive
West Melbourne,
Fl. 32904
(407) 724-6960

38 pp

QUESTIONS PRESENTED

1. Where excessive force by a police officer is alleged in a section 1983 suit, is the standard for qualified immunity that the exact fact pattern must have been determined in an eleventh circuit case to be unconstitutional in order for the section 1983 claim to survive a qualified immunity summary judgment motion?

2. May a single act be indicative of a policy or practice that gives rise to section 1983 liability?

PARTIES

The names of all paries to the proceenings in the court hose judgment5 is sought to be reviewed here appear in the caption of the case. Thereis no parent or subsidiary company of any party to be listed.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Andrew Kranyik, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The unreported opinion of the Court of Appeals is reproduced in the Appendix filed herewith ("App.") at 1a. The unreported opinion of the district court in this case is reproduced at 2a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on December 27, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

The pertinent provision of 42 U.S.C. Section 1983 is set forth below:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State Territory or District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

STATEMENT OF THE CASE

Kranyik was arrested for driving while under the influence, a non-violent misdemeanor crime. He did not resist the arrest in any way, was fifty years of age and weighed in excess of 260 pounds. Kranyik was hand-cuffed behind his back for a period of approximately three hours, while the Respondent officer waited for a mobile testing unit. Kranyik immediately notified the Respondent police officer that he was in pain as a result of the handcuffs.

The Respondent police officer had an alternative measure to conduct sobriety testing instead of keeping the Kranyik in handcuffs for more than three hours awaiting the Brevard County Sheriff Department's mobile sobriety testing unit. Donisi, however, apparently followed the City's procedures, and kept Kranyik hand-cuffed behind his back for a period of several hours.

There was no supervision of the type of handcuffs that were used by the City of West Melbourne Police Department, and officers were not given any specific instruction on how to use handcuffs by the City of West Melbourne. DONISI stated that all police officers bought there own handcuffs from various sources and that he did not know what other officers used.

DONISI stated that the policy of West Melbourne if someone complained about the handcuffs was to call an ambulance and have the subject checked.

There is a factual dispute about whether Kranyik complained about the handcuffs. DONISI stated in his deposition on several occasions that Kranyik never complained about the handcuffs. Kranyik in his affidavit states that he did complain about the pain caused by the handcuffs on several occasions while in DONISI's custody. DONISI in his arrest report,

states that Kranyik did complain of the pain from the handcuffs. Thus, there is a discrepancy in DONISI's own statements.

DONISI indicated in his deposition that there was another procedure to use if the arrested subject was obese. DONISI, however, stated that he did not know what the procedure was, and that he would have to contact a supervisor if he arrested an obese person. DONISI also stated that there were other types of hand-cuffs available, but that he was not trained to use these hand-cuffs.

It is clear that it was accepted procedure to wait for the mobile sobriety testing units, and for the city's officer's to use whatever handcuffs that they happened to have purchased.

Kranyik was diagnosed with carpal tunnel syndrome after his May 14, 1993, arrest. He had not suffered from any pain in his wrists prior to his May 14, 1993 arrest, or any other symptoms of carpal tunnel syndrome prior to this date. Dr. Weiss, who treated Kranyik, stated that Kranyik's symptoms from carpal tunnel syndrome were likely due to an acute injury.

On April 22, 1996, District Judge Anne Conway granted the Respondents' Motion for Summary Judgment, and dismissed Kranyik's complaint. Judge Conway relied on Lassiter v. Alabama A & M University, Bd. of Trustees, 28 F. 3d 1146 (11th Cir. 1994) (en banc): in her decision to grant the Respondents' Motion for Summary Judgment based upon qualified immunity. The standard set forth in the District Court's order is that the "if the case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant. The line is not to be found in abstraction-to act reasonable, to act with probable cause, and so

forth-but in studying how these abstractions have been applied in concrete circumstances." id. at 1149-50.

On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the dismissal of Kranyik's claim.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in this case to resolve the conflict with this Court's previous rulings and the Eleventh Circuit's practice of granting summary judgment based upon qualified immunity unless the exact fact-pattern has been determined to be unconstitutional in the Eleventh Circuit.

The use of a single generic standard in all claims raised under Section 1983, is contradictory to the standard that the Supreme Court established for excessive force cases in Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed. 2d 443 (1989). The Supreme Court has established that "in cases involving an arrest, investigatory stop, or other 'seizure" of a free citizen, the "reasonableness standard of the Fourth Amendment must apply," id. 395, 109 S. Ct. at 1871, Tennessee v. Garner, 471 U.S. 1, 105, S.Ct. 1694, 85 L. Ed. 2d 1 (1985).

The Court in Graham, specifically stated, "[W]e reject this notion that all excessive force claims brought under Section 1983 are governed by a single generic standard." Graham v. Connor, 490 U.S. at 395, 109 S.Ct. at 1871, 104 L.Ed. 2d 443 (1989).

The "reasonableness standard of the Fourth Amendment" is whether a reasonable well-trained officer in similar circumstances would have known that his actions violated the Kranyik's rights. Malley v. Briggs, 475 U.S. 335, 89 L.Ed. 271, at 281, 106 S.Ct. 1092 (1986). Under this "reasonableness"

standard, the Respondent Police officer should have known that he was violating the Kranyik's right to be free from excessive force and restraint under the Fourth and Fourteenth Amendments by keeping the over-250-pound man hand-cuffed behind his back for almost three hours after he had complained several times to the Respondent Officer.

The standard the Court of Appeals of the Eleventh Circuit is using makes is not the same standard that this Court has held must be used in determining whether qualified immunity applies in an excessive force case.

I.

WHERE EXCESSIVE FORCE BY A POLICE OFFICER IS ALLEGED IN A SECTION 1983 SUIT, IS THE STANDARD FOR QUALIFIED IMMUNITY THAT THE EXACT FACT PATTERN MUST HAVE BEEN DETERMINED IN A ELEVENTH CIRCUIT CASE TO BE UNCONSTITUTIONAL IN ORDER FOR THE SECTION 1983 CLAIM TO SURVIVE A QUALIFIED IMMUNITY SUMMARY JUDGMENT MOTION ?

Kranyik disagrees with the standard for qualified immunity that the district court set fourth in determining excessive force cases. The district court relied on Lassiter v. Alabama A & M University, Bd. of Trustees, 28 F. 3d 1146 (11th Cir. 1994) (en banc): in its decision to grant the Respondent officer Donsisi's Motion for Summary Judgment based upon qualified immunity. The standard set forth in the District Court's order is that the "if the case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant. The line is not to be found in abstraction-to act reasonable, to act with probable cause, and so forth-but in studying how these abstractions have been applied in concrete circumstances." id.

This standard is contradictory to the Fourth Amendment 'reasonable' standard, under which the Supreme Court has stated that excessive force cases are to be analyzed, and this generic standard should not be adopted in all cases involving the qualified immunity defense. Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed. 2d 443 (1989); Malley v. Briggs, 475 U.S. 335, 89 L.Ed. 271, at 281, 106 S.Ct. 1092 (1986).

Kranyik respectfully asserts that the use of a single generic standard in all claims raised under Section 1983, is contradictory to the standard that the Supreme Court

established for excessive force cases in Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed. 2d 443 (1989). The Supreme Court has established that "in cases involving an arrest, investigatory stop, or other 'seizure" of a free citizen, the "reasonableness standard of the Fourth Amendment must apply," id. 395, 109 S. Ct. at 1871, Tennessee v. Garner, 471 U.S. 1, 105, S.Ct. 1694, 85 L. Ed. 2d 1 (1985).

The Court in Graham, specifically stated, "[W]e reject this notion that all excessive force claims brought under Section 1983 are governed by a single generic standard." Graham v. Connor, 490 U.S. at 395, 109 S.Ct. at 1871, 104 L.Ed. 2d 443 (1989).

The "reasonableness standard of the Fourth Amendment" is whether a reasonable well-trained officer in similar circumstances would have known that his actions violated the appellant's rights. Malley v. Briggs, 475 U.S. 335, 89 L.Ed. 271, at 281, 106 S.Ct. 1092 (1986). Under this "reasonableness" standard, the Respondent Police officer should have known that he was violating Kranyik's right to be free from excessive force and restraint under the Fourth and Fourteenth Amendments by keeping the over-250-pound man hand-cuffed behind his back for almost three hours after he had complained several times to the Respondent Officer.

Kranyik does not claim that he should not have been hand-cuffed at all, rather, he claims that in light of the circumstances of this case, the manner in which the handcuffs were used was unreasonable. In other words, it was unreasonable to keep the Kranyik hand-cuffed for such an extended period of time without at least removing the handcuffs periodically.

Respondent DONISI used excessive and

unnecessary force when he kept Kranyik's hands hand-cuffed behind his back for more than three hours, and this action was taken pursuant to the established policy and procedures of the Respondent CITY OF WEST MELBOURNE and the City's police department.

The District Court determined that Respondent Donsisi was entitled to qualified immunity, because he did not violate clearly established law.

Kranyik has claimed that the actions described above and alleged in his complaint constitute an unwarranted and unreasonable seizure under the Fourth Amendment, and a violation of his rights under the due process clause of the Fourteenth Amendment.

The Eleventh Circuit following Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed. 2d 396 (1982), has adopted a two-part test in analyzing a public official's motion for summary judgment based on qualified immunity. First, the public official must prove that he was acting in his discretionary capacity at the time of the alleged wrongful act. Then, the burden shifts to the Kranyik to prove that the alleged wrongful act violated clearly established at the time of the incident.

Respondents argument is that there is no clearly established law not to be hand-cuffed. Kranyik, however, is not disputing the legality of his being hand-cuffed, but is instead claiming that the manner in which the restraint was used was unreasonable under the circumstances.

The exact or even almost exact fact-pattern does not have to have been determined by an appellate court to put a police officer on notice that his actions are violating an individual's rights. In Telfair v. Gilberg,

868 F.Supp. 1396 (S.D. Ga. 1994), the a pre-trial detainee alleged that a guard had used excessive force against him. The Court used the Fourth Amendment "reasonableness" standard after determining that the prison guard was acting in his discretionary capacity. id. at 1403. Although the exact fact-pattern had not been litigated the court stated, "it requires little creativity or imagination for a reasonable jail official to guess that choking a physically handicapped detainee and knocking him over might constitute a constitutional violation." id.

This Court has found that "police use of excessive force is a constitutional violation." Mckinney v. Dekalb County, 997 f.2d 1440, 1443 (11th Cir. 1993). This Court has also found that the proper standard in determining whether qualified immunity is appropriate in a pre-trial seizure is the Fourth Amendment 'reasonableness" standard that was used in Graham. Sweat v. Bailey, 876 F.Supp. 1571 (M.D. Ala. 1995). In Sweat, the Court found that an officer who beat an arrestee after the arrestee called him an "ass", was not entitled to qualified immunity. The officer's alleged conduct in Sweat, was "not comparable to a split second decision when an officer is physically threatened. It does not take hindsight or tortured reasoning to conclude that...Messick beat Sweat without provocation, then Messick's conduct was not only malicious but summarily punitive, taking on the roles of grand jury, judge and jury to indict, try and punish Sweat." id. at 1578.

The right to be free from excessive force is a clearly established right. Walton v. City of Southfield, 995 F.2d 1331 (6th Cir. 1993), citing Holt v. Artis, 843 F.2d 242, 246 (6th Cir. 1988).

Excessive force claims are to be analyzed under the Fourth Amendment's objectively reasonable test. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Graham v. Connor, 490 U.S. 386, 394-95, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989).

The legal standard to be used in determining whether the officer is entitled to qualified immunity is whether a reasonably well-trained officer in the Respondent officer's position would have known that the manner in which the hand-cuffs were used in this particular case. Malley v. Briggs, 475 U.S. 335, 89 L.Ed 2d 271, at 281, 106 S. Ct. 1092 (1986). See also, Thompson v. City of Clio, 765 F. Supp. 1066, (M.D. Ala. 1991), quoting, Graham v. Connor, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed. 2d 443 (1989) (The constitutionality of any application of force against a citizen by a state official, in connection with a criminal investigation or otherwise, is judged under a fourth amendment "reasonableness" standard).

It is not necessary that an exact fact pattern that is complained of in a 1983 action have been decided by a court in order for the law to be clearly established. Instead, it has to be such conduct that a reasonable police officer would be put on notice that such conduct was unlawful.Anderson v. Creighton, 483 U.S. 635, 97 L.Ed. 2d 523, 107 S.Ct. 3034 (1987).

Anderson involved a claim by homeowners that an FBI agent's warrantless search violated their rights under the Fourth Amendment. Without any discovery having taken place, the District Court of Appeals granted the agent's summary judgment on the ground

that the search was lawful since it was based on probable cause and exigent circumstances. The United States Court of Appeals for the Eighth Circuit reversed, holding that the right that the agent was alleged to have violated--the right of persons to be protected from warrantless searches of their homes unless the searching officers have probable cause and there are exigent circumstances-was clearly established. id. at 97 L.Ed. 2d 527.

The Supreme Court vacated the Eighth Circuit Court of Appeals' decision, and remanded the case for further discovery. The Court stated in its opinion that the operation of the "objective legal reasonableness" of the officer's actions "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." id. at 97 L.Ed. 2d 530.

The Court went on to state "[I]t should not be surprising, therefore, that our cases establish the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence relevant sense...

this is not to say that an official action is protected by qualified immunity unless the very action in question has been held unlawful;...but it is to say that in the light of pre- existing law the unlawfulness must be apparent. (emphasis added) id.

The Court in Anderson, stated that the purpose of qualified immunity for government officials "is intended to provide government officials with the ability 'reasonably [to] anticipate when their conduct may give rise to liability for damages.'" 483 U.S. 635, 97 L.Ed. 2d 523,534 107 S.Ct. 3034 (1987).

The Eleventh Circuit

"evaluates an excessive force claim by considering such factors as the need for using

force, the relationship between the need for using force and the amount of force used, the reason for using the force-that is whether the officer applied force with good faith or malicious intent, and the extent of the injury suffered."

Samples on Behalf of Samples v. City of Atlanta 846 F. 2d 1328, 1331,, (11th Cir. 1988).

Walton v. City of Southfield, 995 F.2d 1331 (6th Cir. 1993), involved im part a claim of excessive force due to hand—cuffing. In that case the court denied the Respondent's qualified immunity defense, because she alleged that she had informed the officer that she had an injured arm. The court held that there was a genuine fact issue as to whether the officer should have known that hand-cuffing the appellant in that circumstances was unreasonable and therefore excessive.

The present case presents similar facts. Kranyik was an extremely large man, who complained immediately about the pain that the handcuffs caused. He did not resist the officer and was not a threat to him. The officer kept Kranyik hand-cuffed behind his back for more than three hours when there was an adequate alternative for the sobriety testing. Kranyik also suffered permanent injury. Clearly under these facts and a reasonable officer should have known that this conduct was unreasonable and was put on notice that his conduct was violating the law.

Citizens have the right to protection from unjustified intrusions upon their physical and emotional well-being, including the right to bodily integrity. Montgomery v. City of Chicago, 670 F. Supp. 230 (N.D. Ill. 1987).

This right stems from both the due

process clause of the Fourteenth Amendment and the prohibition against unreasonable seizures found in the Fourth Amendment. Gilmere v. City of Atlanta, 774 F. 2d 1495 (11th Cir. 1985) (en banc) cert denied, 476 U.S. 115, 106 S.Ct. 1970, 90 L.Ed. 2d 654 (1986).

Kranyik acknowledges that Walton v. City of Southfield, 995 F.2d 1331 (6th Cir. 1993), was decided after the Kranyik's arrest. It is, however, illogical to state that it was unreasonable to inflict injury through the use of handcuffs after an officer has been put on notice that he might do so in the Sixth Circuit a few months before Kranyik's arrest; but an officer in the Eleventh Circuit is not required to possess the same common-sense to know that leaving a 260 pound man hand-cuffed behind his back for three hours might injure his wrists.

The Court in Walton, did not find that the exact fact-pattern had to have been determined to be unconstitutional by a court. It was enough that a reasonable officer would have been put on notice that his actions might injure and violate the plaintiff's rights to be free from excessive force. Walton v. City of Southfield, 995 F.2d 1331 (6th Cir. 1993), citing Holt v. Artis, 843 F.2d 242, 246 (6th Cir. 1988).

The law regarding the unreasonable use of force was clearly established at the time of the arrest. "The qualified immunity defense should fail if the law governing the Defendant's actions has been clearly established." Ansley v. Heinrich, 925 F.2d 1349 (11th Cir. 1991), quoting, Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed. 2d 396 (1982). The Respondents, therefore, were not entitled to the qualified immunity defense.

II.

MAY A SINGLE ACT BE INDICATIVE OF A POLICY OR PRACTICE THAT GIVES RISE TO SECTION 1983 LIABILITY?

Municipal employees or city council members and the like, who have final rule-making authority can make policy with just one act. Parker v. Williams, 862 F.2d 1471 (11th Cir. 1989).

In Parker, the chief jailer kidnapped and raped the plaintiff, and the plaintiff sued the county and the sheriff under Section 1983. id.

The Eleventh Circuit found the sheriff had final authority to make employment decisions, even though the county had no official policy or well-established custom regarding personnel decisions. Therefore, the sheriff's lack of a background investigation on the jailer could be ascribed to the county for section 1983 liability.
id. at 1480.

The court in Parker, stated that a single incident may be indicative of a policy or practice that may give rise to section 1983 liability. id.

"A 'municipal act' is not" ... "limited to decisions made by the city's official legislative body or written agreements. City policy may also be implicated by the acts of individual policy-making officials or by pervasive city customs." Brown v. City of Ft.Lauderdale, 923 F.2d 1474, 1477 (11th Cir. 1991).

The United States Supreme Court has held that there are "appropriate" circumstances "where a deliberate choice to follow a deliberate course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in

question." Pembaur v. City of Cincinnati, 475 U.S. 469, 483-84, 106 S.Ct. 1292, 1300-01, 89 L.Ed. 2d 452 (1986).

There is evidence that the Respondent city and police chief failed to adequately train and supervise its employees in the proper use of restraints. This lack of training and supervision constituted an official policy or custom of the Respondent city, and this policy or custom evidenced a deliberate indifference to Kranyik and others. This policy directly led to the injuries to Kranyik.

The Respondent officer deliberately chose to keep Kranyik's hands hand-cuffed behind his back when there was another viable alternative. Respondent officer chose this course of action even after being informed that Kranyik was in pain, and despite the fact that Kranyik had given him no resistance to his arrest for a non-violent crime. Respondent officer stated in his deposition that he took these actions pursuant to the City's policies. Respondent LOCK was the chief of police of the Respondent City, and so responsible for the supervision and training of his officers. Therefore, the Respondent city and LOCK should be liable for its policies and lack of training and supervision that led to Kranyik's injuries.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,
ANDREW KRANYIK
pro se
7640 Coral Drive
West Melbourne, FL 32904
(407) 724-6960

APPENDIX A
ORDER OF THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 96 - 2694
Non-Argument Calendar

D. C. Docket No. 94-960-CIV-ORL-22

ANDREW MARTIN KRANIK,
Plaintiff-Appellant,

versus

CITY OF WEST MELBOURNE, FLORIDA a Florida municipality, BRIAN LOCK, Police Chief of the City of West Melbourne Police Department in his official capacity, PAOLO DONISI, individually and as a City of West Melbourne police officer,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(December 27, 1996)

Before KRAVITCH and COX, Circuit Judges, and FAY, Senior Circuit Judge

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.

"Costs taxed against plaintiff-appellant.

1

11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based of on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury bverdict is sufficient;

(c) the order of an administrative agency is supported by substanial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is wupported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precendential value, the judgment or order may be affirmed or enforced without opinion.

_____

Deputy Clerk

APPENDIX B
MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT COURT OF FLORIDA DATED APRIL 22,1997

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION

ANDREW MARTIN KRANYIK
Plaintiff,

-vs- CASE NO. 94-960-CIV-ORL-22

CITY OF WEST MELBOURNE, FLORIDA, et al.,

Defendants.
_____/

ORDER

I. INTRODUCTION

The Plaintiff, Andrew Martin Kranyik, sues the City of West Melbourne ("the City"), its police chief, Brian Lock ("Chief Lock"), and one of its officers, Paolo Donisi ("officer Donisi"), pursuant to 42 U.S.C. section 1983. Kranyik claims that Officer Donisi subjected him to excessive and unreasonable force following Kranyik's arrest for driving under the influence. More specifically, Kranyik complains of the manner

in which Officer Donisi handcuffed him, and the length of time he was left handcuffed. Kranyik maintains that the handcuffing caused him to develop bilateral carpal tunnel syndrome.

The Defendants seek summary judgement on the basis, inter alia, that Officer Donisi is entitled to qualified immunity, that Kranyik has not presented sufficient "policy or custom" evidence to impose section 1983 liability on the City, and that there is no basis for holding Chief Lock liable under the statute. After carefully considering the matter, the Court determines that Defendants are entitled to summary judgment.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only when the Court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure. In making this determination, the Court must view all of the evidence in a light most favorable to the non-moving party. Samples on Behalf of Samples v. city of Atlanta, 846 F.2d 1328, 1330 (11th Cir. 1988). The moving party has the initial burden of establishing the absence of a genuine issue of fact. Celotex Corpl v. Catrett, 477 U.S. 317 (1986). Next, the "non-moving party...bears the burden of coming forward with sufficient evidence of every element that he or she must prove." Rollins v. Techsouth, Inc., 833 F.2d 1525, 1528 (11th Cir. 1987). To that end, the non-moving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file', designate 'specific facts showing that there is a genuine issue for trial.'"

Celotex, 477 U.S. at 324.

III. FACTS 1

Officer Donisi arrested Kranuyik at 10:53 p.m. on May 14, 1993, following a traffic stop. At the time of his arrest, Kranyik was 5'9" tall and weighed approximately 260 pounds. Officer Donisi handcuffed Kranyik behind his back and placed Kranyik in Donisi's patrol car.2 The handcuffs Donisi used were his personal property. After arresting Kranyik, Donisi radioed for the assistance of the Brevard County Sheriff's Department's mobile breath testing unit, commonly referred to as the "BAT Mobile". and proceeded to another location to await the arrival of the BAT Mobile. After being placed in the patrol car, Kranyik remained seated upright for 10-15 minutes. Kranyik felt the handcuffs "tighten up"; this may have been caused by him leaning back against them.
During this 10-15 minute period, Kranyik began to experience pain in his wrists. He complained to Officer Donisi two to three times that his hands were hurting, stating that his hands were "killing him." Kranyik asked Donisi to either remove the handcuffs or handcuff him with his hands in front of him.3 Donisi did not

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1 For the purpose of resolving the instant motion, the Court accepts Kranyik's evidence as true and construes all inferences in Kranyik's favor.
2 There is a dispute concerning whether Officer Donisi used two sets of handcuffs on Kranyik, or only one. Donisi maintains the he used two sets of handcuffs and fastened them together so as to allow Kranuyik more range of movement. Donisi further claims that he "double-locked" both sets of handcuffs in order to prevent them from accidentally tightening. For his part, Kranyik believes Donisi used only one set of handcuffs. This fact dispute is immaterial for the purpose of resolving the instant motion.

3 In his deposition, Officer Donisi testified that he was "very sure" that

Kranyik never complained about the handcuffs. Dkt51 at 26. In a subsequent affidavit supporting the summary judgment motion, Donisi stated that he "did not recall Mr. Kranyik making any complaint...about his handcuffs or wrists." Dkt.36, para. 8, at 2. However, Kranyik's counsel has filed an arrest affidavit, purportedly signed by Donisi, that states: "Mr. Kranyik complained about the handcuffs even though I used 2 sets in order to (illegible) him." Attachment to Dkt. 48.

respond. To relieve the pressure on his wrists, Kranyik ended up lying on his side in the back seat of the patrol car. The BAT Mobile arrived approximately one hour after Kranyik was initially handcuffed. Officer Donisi took Kranyik out of the patrol car and removed the handcuffs. Kranyik again complained to Donisi about the handcuffs. Kranyik remained unhandcuffed for a period of at least 5 minutes. Officer Donisi reapplied the handcuffs, again cuffing Kranyik with his hands behind his back, and returned Kranyik to the patrol car. Kranyik remained there until the arrival of a Sheriff's Department Transportation van. After the van arrived, Donisi's handcuffs were removed, then Kranyik was handcuffed with Sheriff's Department handcuffs. However, this time Kranyik was handcuffed with his hands in front of him. Leg irons were also placed on Kranyik.

Kranyik was then transported in the van to the Sheriff's Department's substation, a trip he estimates took approximately 20 minutes. He arrived at the substation sometime after 1:00 a.m.. The Sherriff's Department's handcuffs were removed after Kranyik entered the substation. Kranyik remained at the substation until approximately 3:00-4:00 a.m., whereupon he was re-handcuffed and transported to another Sheriff's Department facility. That trip took 15-30 minutes. In his affidavit opposing the motion for summary judgment, Kranyik maintains that he was handcuffed, in Officer Donisi's

custody, from 10:43 p.m. to 1"25 a.m., except for the 5 minutes he was unhandcuffed following the arrival of the BAT Mobile.

IV. LIABILITY OF OFFICER DONISI

A. Qualified Immunity Law

The law of qualified immunity is summarized in Lassiter b. Alabama A & M University, Bd. of Trustees, 28 F.2d 1146 (11th Cir. 1994) (en banc):

I. Qualified immunity protects government officials performing discretionary functions from civil trials (and the other burdens of litigation, including discovery) and from liability if their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known. The qualified immunity doctrine means that government agents are not always required to err on the side of caution.

II. That qualified immunity protects government actors is the usual rule; only in exceptional cases will government actors have no shield against claims made against them in their individual capacities. Unless a government agent's act is so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing, the government actor has immunity from suit. Because qualified immunity shields government actors in all but exceptional cases, courts should think long and hard before stripping defendants of immunity.

III. For the law to be clearly established to the point that qualified immunity does not apply, the law must have

earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that what he is doing violates federal law. Qualified immunity is a doctrine that focuses on the actual, on the specific, on the details of concrete cases.

The most common error we encounter, as a reviewing court, occurs on this point: courts must not permit plaintiffs to discharge their burden by referring to general rules and to the violation of abstract rights. General propositions have little to do with the conceptof qualified immunity. If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant. The line is not to be found in abstractions--to act reasonably, to act with probable cause, and so forth-- but in studying how these abstractions have been applied in concrete circumstances. And, as the en banc court recently accepted:

> When considering whether the law applicable to certain facts is clearly established, the facts of cases relied upon a precedent are important. The facts need not be the same as the facts of the immediate case. But they do need to be materially similar. Public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases.
>
> For qualified immunity to be surrendered, pre-existing law must dictate, that is, true compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federallaw in the circumstances.

IV. Because qualified immunity is a doctrine of practical application to real-life situations, courts judge the acts of defendant government officials against the law and facts at the time defendants acted, not by hindsight, based on later events.

V. The subjective intent of government actor defendants plays no part in qualified immunity analysis0 Objective legal reasonableness is the touchstone.

Id. at 1149-50 (emphasis in original: citations, quotations and footnotes omitted). Post-Lassiter, a government actor can properly be denied qualified immunity only in exeptional - perhaps even rare-circumstances. Though Lassiter was not a police excessive force case, it applies equally in that context. Illustrative of Lassiter's impact on section 1983 cases involving alleged excessive force is the Eleventh Circuit's treatment of Harrell v. Decatur County, Ga., 22 F.3d 1570 (1994). opinion vacated on rehearing, 41 F.3d 1494 (11th Cir. 1995). Harrell involved a police shooting in which the suspect was killed. Two members of the appellate panel that initially considered the case reversed the district judge's grant of summary judgment based on qualified immunity. Judge Dubina issued a vigorous dissent. In the interim, Lassiter was decided. On rehearing of harrell, the court vacated its prior opinion in the case and affirmed the district court's grant of summary judgement "for the reason set forth in Judge Dubina's dissenting opinion... and this court's recent decision in Lassiter... which the panel did not have the benefit of at the time we released our opinion in Harrell." Harrell v. Decatur County, Ga., 41 F.3d 1494 (11th cir. 1995).

Procedurally, once a defendant invoking qualified immunity proves that she was acting

within the scope of her discretionary authority when the allegedly wrongful act occurred, the burden shifts to the plaintiff to demonstrate that the defendant violated clearly established law. Rich v. Dollar, 841 F.2d 1558, 1563-64 (11th Cir. 1988); see also, Lassiter, 28 F.3d at 1150 n.2 ("Once the qualified immunity defense is raised, plaintiffs bear the burden of showing that the federal 'rights' allegedly violated were 'clearly established'").

B. Analysis

Donisi has shown that he was acting within the scope of his discretionary authority with respect to the events about which Kranyik complains. See, Rich, 841 F.2d at 1564 (government official proves he acted within the scope of his discretionary authority by showing "objective circumstances which would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority"). Hence, Kranyik bears the burden of demonstrating that Donisi violated clearly established law. Id. at 1563-64. To meet that burden, Kranyik must show that existing law would have compelled every like-situated, reasonable government actor to conclude that what Donisi was doing, and did violated federal law under the particular circumstances in which he found himself. Lassiter, 28 F.3d at 1150. In other words, accepting Kranyik's version of events, Kranyik must show that under the law that existed at the time of the incident, every like-situated, reasonable police officer would have been compelled to conclude that in the face of Kranyik's complaints, the officer was violating federal law by not removing the

handcuffs for more than five minutes or by not rehandcuffing Kranyik with his hands in front of him.

Kranyik has failed to make the necessary showing. Kranyik has not identified any materially similar pre-existing decisional authority that would have compelled every reasonable officer in Donisi's place to conclude that he or she was violating federal law.

Kranyik cites one handcuffing case, Walton b. City of Southfield, 995 F.2d 1331(6th Cir. 1993). However, that case is unpersuasive. For one thing, Walton does not represent pre-existing law. Walton was decided after Kranyik's arrest. For another, Walton has limited qualified immunity precedential value because it was decided by a Court of Appeals other than the Eleventh Circuit. Finally, Walton is materially distinguishable from the instant case. Walton involved a non-intoxicated arrestee who suffered a pre-existing medical condition that made handcuffing painful, and who notified the officers of that condition before she was handcuffed. See Nemeckay v. Rule,894 F. Supp. 310,318 n.4 (D. Mich. 1995) (recognizing these distinctions and noting that Walton involved the issue of the use of handcuffs in the first instance, "not simply a failure to remove handcuffs after they had been legitimately applied").

In sum, this is not one of those exceptional cases in which a government actor must be stripped of qualified immunity. The motion for summary judgment is due to be granted insofar as it raises qualified immunity on behalf of Officer Donisi.

V. LIABILITY OF THE CITY

A. Applicable Law

The standard for imposing section 1983 liability on a municipality is succinctly summarized in Gilmere v. City of Atlanta, Ga. 737 F.2d 894 (11th Cir. 1984), cert. denied, 476 u.s. 1115 (1986). Monell v. Department of Social Services [,436 U.S. 658 (1978)] holds that a municipality can be sued for damages under 42 U.S.C. Section 1983... when "the action that is alleged to be unconstitutional implements or execute a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or is "visited pursuant to governmental 'custom' even though such custom has not received formal approval through the body's official decision making channels." Monell, 436 U.S. at 690-91, rev'g in part Monroe v. Pape, 365 U.S. 167 (1961). Thus, Monell imposes liability on municipalities for deprivations of constitutional rights visited pursuant to municipal policy, whether that policy is officially promulgated or authorized by custom. The official policy or custom "must be 'the moving force of the constitutional violation' in order to establish liability of a government body under section 1983." Polk County v. Dodson, 454 U.S.312 (1981). See Williams v. City of Valdosta, 689 F.2d 964,969 (11th Cir. 1982). citing Schneider v. City of Atlanta,628 F.2d 915, 920 (5th Cir. 1980); see also Hearn v. City of Gainesville, 688 F.2d 1328 (11th Cir. 1982).Gilmere, 737 F.2d at 901 (parallel Supreme Court citations and Footnote omitted).

V. Analysis

It appears that Kranyik attributes his alleged constitutional injury to the following

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"policies or customs" of the City: (1) the alleged failure to train and supervise its officers concerning the use of handcuffs; (2) the alleged policy of allowing officers to use their personally-owned handcuffs; and (3) the alleged policy of utilizing the Sheriff's Department's BAT Mobile to test arrestees for intoxication, rather than having such tests performed at the City's police station.

Concerning the first point, it is undisputed that Officer Donisi did in fact receive training in the use of handcuffs during his police academy training at Brevard Community College. Dkt.51 at 17: Dkt.36, para 10, at 2. Chief Lock has testified that he is aware that handcuffing is taught to prospective police officers at the police academy. Dkt.37, para.6, at 2. It is immaterial that the city did not provide the training; what is material is that Kranyik has not presented any evidence that a lack of training or supervision was the "moving force" behind the alleged constitutional deprivation.

Concerning Kranyik's allegation that the City allowed officers to use their own handcuffs, Kranyik has similarly failed to show that this "policy" caused the constitutional injury alleged. More specifically, Kranyik has not presented any evidence that there was anything abnormally injurious about the particular handcuffs Donisi used on Kranyik, or that any other type of restraints would have been less injuries. Although Kranyik complains about Donisi's failure to use plastic-tie type restraints instead of handcuffs, he has offered no evidence that such restraints would have been less injurious than the handcuffs that were used.

Kranyik has also not presented any evidence that the City's "policy" of using the

Sheriff's Department's BAT Mobile for sobriety testing was the moving force behind the alleged constitutional violation. By way of background, Donisi testified that he called for the BAT Mobile rather than taking Kranyik to the City police station for testing. Donisi did this despite the fact that there was an operating Intoxilyzer at the City's police station, which was located approximately 3-4 miles from the scene of the arrest. Dkt.51 at 27-28. When questioned concerning the reason he elected to use the Sheriff's BAT Mobile because if a case went to trial, it would not "tie up any of the local people." Dkt.51 at 27.

Kranyik suggests that the decision to use the BAT Mobile resulted in Kranyik remaining handcuffed for longer than he would have had he been taken to the police station for sobriety testing. However, that conclusion rests on speculation. Kranyik has not presented evidence that he would have been handcuffed for a shorter period of time had he been transported to the police station.4 More importantly, it is the failure to _____

4There is no evidence that the City had a breath testing machine operator on duty that evening, or, if it did, that the operator was not otherwise occupied. There is also no evidence concerning what holding facilities for arrestees were available at the police station, and whether, and for how long, arrestees typically remained handcuffed following their arrival at the police station.

remove or loosen the handcuffs that is truly at issue in this case. Assuming that the handcuffs should have been removed or adjusted, there was nothing about the City's policy of using the BAT Mobile that prevented Donisi from removing or loosening the handcuffs while awaiting the arrival of the BAT Mobile and, later, the Sheriff's transportation van.

Finally, assuming that Kranyik complained to Officer Donisi about the handcuffs and that Donisi's failure to remove them constituted excessive force, there is evidence that the City had a policy that, if followed, would have prevented the constitutional violation at issue. In that regard, Donisi testified in substance that the City's procedure was that if an arrestee complained about handcuffs, the officer was to call an ambulance, have the arrestee checked, and obtain a medical release. Dkt. 51 at 26-27.

Based on the foregoing, the Court determines that Kranyik has failed to present sufficient "policy or custom" evidence to preclude summary judgment in favor of the City.

VI. LIABILITY OF CHIEF LOCK

Kranyik has sued Chief Lock in his official capacity. Monell's "policy or custom" standard of liability applies to officials sued in their official capacity. Colvin v. McDougall, 62 F.3d 1316, 1318 (11th Cir. 1995). Further, there is no respondent superior liability under section 1983. Harris v. Ostrout, 65 F.3d 912, 917 (11th cir.1995) (citing Monell, 436 U.S. at 690-92). Accordingly, Chief Lock may be held liable only if he "either personally participated in the acts comprising the alleged constitutional violation or instigated or adopted a policy that violated [Kranyik's] constitutional rights." Adams v. Poag, 61 F.3d 1537, 1544 (11th Cir. 1995).

As previously discussed, Kranyik has produced insufficient evidence that any policy of the City was the moving force behind the alleged constitutional violation of which he complains. Kranyik has similarly failed to

produce evidence that he was injured as a result of any policy of Chief Lock. Further, Chief Lock has stated under oath that he did not personally participate in Kranyik's arrest and handcuffing, and that he was not even present at the scene of the arrest. See Dkt. 37, para.4, at 2. Kranyik has not produced any evidence controverting these statements. Accordingly, Chief Lock is entitled to summary judgment.

VII. CONCLUSION

Based on the foregoing, the Court determines that the Defendants are entitled to summary judgment. Accordingly, it is ORDERED as follows:

1. the "Motion for Summary Judgment by Defendants, City of West Melbourne, Florida, Brain Lock and Paolo donisi" (Dkt.33), filed December 29, 1995, is GRANTED.

2. The Clerk is directed to enter a final judgment providing that the Plaintiff, Andrew Martin Kranyik, shall take nothing on his claims against the Defendants, City of West Melbourne, Florida, Brian Lock, and Paolo Donisi, and further providing that the Defendants shall recover their costs of action.

3. Any other pending motions are denied as moot.

4. The Clerk shall close the file.

DONE AND ORDERED in chambers in Orlando, Florida, this 22nd of April 1996.

ANNE C. CONWAY
United States District Judge

Copies to : Counsel of Record
Any Unrepresented Parties
Courtroom Deputy
Judge Conway's Chambers